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THE FREEDOM OF THE PRESS.

WE WHO have always lived in a free country must find it hard to realize how long and rough has been the road by which our liberty has been won. Slowly and by an uncertain way man has struggled toward freedom. It could not be otherwise. Liberty is a complex thing and eludes precise definition, and on all sides powerful forces and adverse conditions have stood in the way of progress. Privilege, strongly entrenched, knowing what it wanted and determined to have it, for centuries easily prevailed over ignorance, superstition and inertia. But within the last five or six hundred years new forces or influences, of diverse origins, operating independently yet toward the same end, have produced a mighty change in the relations of governments to the people governed. Ancient inequalities between men have disappeared or are disappearing. Thus human slavery could not permanently survive in the light of the Christian teaching that all men are equal before God. Likewise, an aristocracy based upon individual prowess in war was doomed when the invention of gunpowder made the churl the equal in battle of the steel-clad knight.

But of all human devices that have operated to set men free, it was the invention of printing that has dealt the most powerful blow to tyranny and misrule. We have come to think that the only free government is the democratic government, a government resting upon the consent of the governed. But democracy is government by public opinion, and it is mainly the printing press that makes possible the development and expres-

sion of opinion. It is through the press that governments are made responsible to the people. Unless, therefore, the press be free, there can be no true liberty. "Give me," wrote Milton, "the liberty to know, to utter, and to argue freely according to conscience above all liberties." It is through freedom of discussion that the people are enabled to control their governments, and it is by the control of the government that all other liberties are secured. "It is because the liberty of the press resolves itself into this great issue," declared Mr. Erskine, "that it has been, in every country, the last liberty which subjects have been abie to wrest from power. Other liberties are held *under* governments, but the liberty of opinion keeps governments themselves in due subjection to their duties."

That the free expression of opinion is incompatible with autocratic government is a truism which autocracy has ever been quick to recognize. Long before the invention of printing it was not an uncommon thing for governments to suppress or punish the expression of opinions calculated to disturb the existing order. In the fifth century before Christ, Protagoras was expelled from Athens for expressing doubt as to the existence of the gods, and his books were burned. According to Eusebius, the Emperor Diocletian burned the Christian Scriptures, and in turn the Church waged a relentless war against heretical writings. The works of the great heretic, Arius, were condemned to the flames by the Council of Nicaea, in the year 325. The Roman church issued a list of proscribed books, possibly as early as 494, and in the thirteenth century the works of Aristotle were put under the ban.

But it was the invention of printing, about the middle of the fifteenth century, that called into most intense activity the opposition to freedom of thought. The rapid multiplication of books by this new process called for more effective modes of suppression. From that time to the present day governments have sought to prevent the publication and circulation, and even the reading, of writings deemed hurtful to government, religion, or morality. Such a course is logical where the government does not rest upon the enlightened consent of the people. It is only when the government has nothing to fear from

criticism that freedom of discussion can be safely permitted. And the fluctuations in the degree of the liberty of the press in the history of the several nations accurately reflect the course of the struggle for liberty in general.

It should be observed that, as a rule, the freedom of the press has been restricted only in respect to matters in which the government has been concerned on its own account. Discussions of the government itself, and of religion, when church and state were united, have been prohibited or limited by autocratic governments as a matter of self-protection. Only recently have governments undertaken to protect the morals of the people, and hence, during periods of the most rigid control of the press in respect to political and religious discussions, the utmost freedom has been allowed in the publication of writings merely obscene or immoral

Several principal methods have been employed for restricting the freedom of the press. A simple method is the prohibition of the reading of objectionable works, or the destruction of the works themselves. But the press has been restrained chiefly by the establishment of a censorship, or the punishment of authors and publishers, and to some extent, by limiting the right to own or use printing presses.

The first index, or list of prohibited books in the modern sense, was published by Pope Paul IV, through the Inquisition at Rome, in 1557. Among the books that have been placed upon the lists issued by the Roman church are, the works of Galileo, Copernicus, Grotius,[1] Gibbon, Bacon, Milton, Locke, Adam Smith, and John Stuart Mill. The Roman Index was, of course, not operative in England after the Reformation, but many books have been burned by the English authorities. Among them were early translations of the Bible, including

[1] GROTIUS' DE JURE BELLI AC PACIS was published in 1625 and was placed on the Papal Index in 1627. It is stated that the application of Pope Leo XIII for the admission of a delegation to the Hague Peace Conference, in 1899, was refused because, among other things, this book, in which are laid the foundations of international law, was still on the proscribed list. Yielding to the weight of public opinion, the Pope, in 1901, caused the inhibition to be removed.—VREELAND, HUGO GROTIUS, 167.

Tyndal's version, Milton's *Defensio pro Populo Anglicano,* and Defoe's *Shortest Way with Dissenters.* The last instance was Hutchinson's *Commercial Restraints of Ireland Considered,* which was burned in 1779.

The censorship has always been popular with autocratic governments. It was of papal origin. Within about half a century after the invention of printing, Pope Alexander VI, in 1501, introduced the principle of the censorship by a bull against unlicensed printing. Clerical censors were established by the Roman church in 1515. Along with the censorship the index of prohibited books was employed. Thus did the Roman church, as Milton, with flaming indignation, exclaims, "rake through the entrails of many a good old author with a violation worse than any could be offered to his tomb. Nor did they stay in matters heretical, but any subject that was not to their palate they either condemned in a prohibition, or had it go straight into the purgatory of a new index. To fill up the measure of encroachment, their last invention was to ordain that no book, pamphlet, or paper should be printed (as if St. Peter had bequeathed them the keys of the press also out of Paradise) unless it were approved by two or three glutton friars." But if the censorship was originated by the church, the temporal governments were ready enough to adopt it when it suited their purposes. Nor were the Protestants, when it came their turn, unwilling to employ this papal device against their antagonists of Rome.

Even without a censorship the government may powerfully restrain the press through its undoubted right to punish the author or publisher of such matter as it may deem unlawful. There is no such thing as an unlimited right to print whatever one may choose to print, regardless of its character or effect. Without law there can be no liberty, and freedom of the press does not mean irresponsibility for what is printed. All right-thinking men will join with Alexander Hamilton [2] in his reprobation of "the pestilential doctrine of an unchecked press," and agree with him that ill-fated would be our country were this doctrine to prevail.

[2] Argument in People *v.* Croswell, 3 Johns. Cas. (N. Y.) 337 (1804).

It is for the state to say what publications are harmful, what use of the press is permissible. It would be an act of tyranny under normal conditions to deprive a citizen of the right to own a gun, but it is essential to public safety to prevent him from using it to the injury of others. So it is with the printing press, an instrument not less dangerous than a shot gun. It is not tyrannous nor inconsistent with the freedom of the press that its owner should be held accountable for any improper use he may make of it.

Injury to an individual, by written or printed attacks upon his character or reputation, may be redressed by a civil action for damages for the libel. Where the injury is to the public, the remedy is by criminal prosecution. This may be for a libel upon a private individual as tending to a breach of the peace, or for a libel upon the government or upon religion, that is, for seditious or blasphemous libel. Probably in most early systems of law slander and libel have been dealt with as criminal or quasi-criminal offenses. In Roman law the subject was highly developed and slander and libel were severely punished. The early English law on the subject is obscure. Civil actions were common as early as the thirteenth century, but the first reported case in which it was held that libel is punishable at common law was decided by the Star Chamber in the reign of James I. This tribunal enforced the law with the utmost severity.

The difficult question, and the one upon the proper solution of which the freedom of the press depends, is to determine what shall be considered libellous. There would be no real freedom of the press if the government itself were under no restraint and could arbitrarily punish anything that might be published. In this connection two main questions have engaged the attention of English lawyers. One of these is, whether in a prosecution for libel the truth of the alleged defamatory matter can be offered as a defense. On this point the prevailing opinion was that the truth is no defense. The maxim of the common law was, "the greater the truth the greater the libel." The other question was, who shall decide whether the words used were libellous, that is, shall the judge

or the jury determine what may be lawfully written or printed? The importance of this question is manifest. The question as to the function of the jury in libel trials was long in dispute. On the one hand it was contended that the jury were to decide, not only as to the fact of publication and the intended meaning of the words used, but also as to whether the words used were libellous. According to this view the whole question of the guilt or innocence of the accused lay with the jury. The other view, and the one which finally prevailed as the common law rule, was that the jury were to determine only the fact of publication and the meaning of the words used, and that the court alone had the power to decide as to the character of the words as libellous or not. This, of course, makes the judge the final authority as to what may lawfully be published, and puts into his hands a power that has not infrequently been used in an unscrupulous and tyrannical manner.

It has been aptly observed that liberty of the press is "a plant of slow growth." England led the way in the struggle for this freedom, and only in English-speaking countries has the press for any considerable time been really free. In most countries it is not yet free. The policy of repression was adopted in England, as in other countries, at an early date. Even before the invention of printing the church undertook to control the expression of opinion, and in 1382 an ordinance was obtained directed against unlicensed preachers. This ecclesiastical censorship was still asserted after the invention of printing, but after the Reformation of the sixteenth century control of the press was exercised mainly by the crown. In the words of a recent writer,[3]

> "It became a part of the royal prerogative to appoint a licenser, without whose imprimatur no writing could be lawfully published, and the printing of unlicensed works was visited with the severest punishments. Printing was further restrained by patents and monopolies. The privilege was confined, in the first instance, under regulations established by the Star Chamber in Queen Mary's reign, to members of the Stationers' Company, and the number

[3] TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY, 594.

of presses and of men to be employed on them was strictly limited. Under Elizabeth the censorship was enforced by more rigorous penalties. All printed matter was interdicted elsewhere than in London, Oxford, and Cambridge, and nothing whatever was allowed to be published until it had first been 'seen, perused, and allowed' by the Archbishop of Canterbury or the Bishop of London, except only publications by the Queen's printers, to be appointed for some special service, or by law printers, for whom the license of the chief justice was sufficient. Mutilation or death was the penalty for those who dared to print anything which the judges might choose to construe as seditious or slanderous to the government in church or state."

In 1581 it was made a capital offense by statute "to write, print or set forth any manner of book, rhyme, ballad, letter or writing containing any false or seditious matter to the defamation of the Queen's majesty, or the encouragement of insurrection or rebellion within the realm." [4] Under this act several of the Puritan party were executed for publishing works which were brought within the statute by the strained construction put upon them by the judges.

Under James I and Charles I this policy was continued. The notorious Star Chamber severely repressed all political and religious discussion. It was no light matter to incur the displeasure of this grim tribunal, especially under Archbishop Laud. In 1634, for a publication which was construed as reflecting upon the king and queen, one William Prynne, was sentenced to be imprisoned, fined £5,000, disbarred from the legal profession and degraded from his Oxford degree to be set in the pillory and to have his ears cut off. The fine was remitted, but the rest of the sentence was executed. In 1637, Prynne was again before the Star Chamber for another publication. This time the stumps of his ears were shorn off in the pillory and he was sentenced to life imprisonment. At the same time two other victims suffered similar punishment. Immediately afterwards, on July 11, 1637, the Star Chamber published a most elaborate and drastic ordinance against the press.

[4] 23 Eliz. c. 2.

But the days of the Star Chamber were numbered. The cruel treatment of Prynne and his fellow sufferers aroused general sympathy and indignation. Immediately upon the meeting of the Long Parliament, in 1640, the three prisoners were liberated and reparation voted to them at the expense of their persecutors. Prynne joined vigorously in the prosecution of Laud which resulted in bringing that prelate to the block in 1644. The Star Chamber was abolished in 1641, and for a short time the press was free. Abundant use was made of this freedom and tracts and pamphlets issued from the presses in shoals. It is stated that more than 30,000 political pamphlets and newspapers, issued during the twenty years from 1640 to the Restoration, are preserved in the British Museum, bound up in 2,000 volumes.

But the freedom of the press was short lived. It makes a difference whose ox is gored. The Puritans, who had suffered so much under the royalist party, now became themselves the persecutors of the press. By an ordinance of June 14, 1643, the censorship was re-established with all its former vigor. It was this ordinance that called forth, in 1644, Milton's famous *Areopagitica,* or plea "For the Liberty of Unlicensed Printing," in the form of an address to Parliament, itself an unlicensed work. This address, written as Milton tells us, "after the true Attic style, in order to deliver the press from the restraints with which it was encumbered," entitles the author to rank as the first great champion of the freedom of the press. This "noble discourse," as Macaulay terms it, has ever been regarded as one of the most splendid appeals for freedom to be found in literature. The poet Montgomery pronounces it "probably the most complete and perfect oration in our language." Prescott describes it as "the most splendid argument, perhaps, the world had then witnessed in behalf of intellectual liberty." Treitschke refers to it as the "magnificent *Areopagitica,* the finest defense for liberty of the press which has ever been written."

Throughout his address Milton expressed the confident expectation that Parliament would abolish the censorship. In this he was disappointed, and came soon to find that "New Presbyter

is but old Priest writ large." Milton himself was a victim of the censorship, though he did not suffer in his person. Some of his prose writings were mutilated before their publication was allowed, and *Paradise Lost* narrowly escaped suppression by Rev. Thomas Tomkyns, the censor, because of a suspicion of treason lurking in the somewhat obscure reference to perplexed monarchs in the figure of the rising sun as applied to Satan.

Under the Independents and the Protectorate the press fared somewhat better, but was not free. Harrington's work on government, *The Oceana,* was seized by Cromwell. Through the influence of the Protector's daughter Harrington recovered the book. "Let him have his book," said Cromwell, "if my government is made to stand, it has nothing to fear from paper shot." Whether he spoke as a statesman or in contempt of the influence of the press does not appear.

After the Restoration the control of the press was reasserted by the government in the licensing act of 1662, which was continued by successive renewals until 1679. During this period "authors and printers of obnoxious works were hung, quartered, mutilated, exposed in the pillory, flogged, or simply fined and imprisoned, according to the temper of the judges; and the works themselves were burned by the common hangman." [5]

The licensing act was not renewed in 1679, and from that date until the accession of James II in 1685, there were no press laws. But by reason of the rigid enforcement of the common law of seditious libel the press was still held in check. The judges declared it to be a crime to print anything about the government without royal license. Chief Justice Scroggs said, in a trial before him in 1680, "If you write on the subject of government, whether in terms of praise or censure, it is not material; for no man has a right to say anything of government." As Macaulay says, "the temper of judges and juries was such that no writer whom the government prosecuted for a libel had any chance of escaping. The dread of punishment,

[5] TASWELL-LANDMEAD, ENGLISH CONSTITUTIONAL HISTORY, 596.

therefore, did all that a censorship could have done." Unofficial newspapers went out of existence and the only sources of political information for the citizens of London were two colorless government papers and the gossip of the coffee houses, while the people of other towns and the country had to depend upon newsletters written by professional newsgathers in London.

Upon the accession of James II in 1685, the licensing act was renewed and was continued in force until it finally expired May 3, 1695.[6] The Commons refused to renew it in 1695, and from that date there has been no press censorship in England. Thus, as Macaulay says, "the Commons came to a vote, which at the time attracted little attention, which has been left unnoticed by voluminous annalists, and of which the history can be but imperfectly traced in the archives of Parliament, but which has done more for liberty and for civilization than the Great Charter or the Bill of Rights." The Commons themselves seem not at all to have appreciated the real significance of their action. They rejected the bill not because they were opposed to the principle of the censorship but because of objections to matters of detail in the act and abuses and difficulties of administration. A less objectionable bill was in the hands of a committee, but the session closed before it was reported.

The passing of the censorship was a great step forward in the progress of English liberty, and when we consider the extreme importance to liberty of the freedom of the press, and the instant and universal recognition by autocratic governments of the menace it offers to their authority, we are struck with the fact that those who have had most to gain from a free press have so generally been insensible to its importance. The people at large, always slow to understand the true foundations upon which their liberties rest, have been singularly indifferent to this most important of all their liberties. Here and there has risen some champion of the freedom of the press, such as Milton, Erskine, or Alexander Hamilton, but in the long history of the emancipation of the press the people have played a very small part. The prevalence of illiteracy may to some

[6] MACAULAY, 3 HISTORY OF ENGLAND, 374. It is usually stated that the act finally expired in 1694.

extent account for their indifference. A man who can neither read nor write cannot be expected to take a very lively interest in the freedom of the press. And even among the educated the deep-seated habit of unquestioning obedience to established authority caused the control of the press by the government to be accepted as a matter of course. Until the notion of government by consent superseded that of government by divine right, public opinion was not a recognized factor in politics. Public opinion, like democracy, is a new force, not definitely recognizable, perhaps, before the American and French Revolutions. The general recognition, therefore, of the importance of the freedom of the press as an organ of public opinion, is also of recent date. Moreover, it requires a somewhat philosophic cast of mind, not often found among the uneducated, to discern the connection between freedom of discussion and civil and religious liberty.

Even during the Revolution of 1688, that brought to an end the tyranny of the Stuarts and established a new succession based upon the consent of the people, the importance of securing the freedom of the press was not yet understood. The convention that called William and Mary to the throne seems never to have thought of abolishing the censorship, nor is freedom of the press mentioned in the Bill of Rights. And we may say with Macaulay, with reference to the deliberations of the convention, "It is a most remarkable circumstance that, while the whole political, military, judicial, and fiscal system of the kingdom was thus passed in review, not a single representative of the people proposed the repeal of the statute which subjected the press to a censorship. It was not yet understood, even by the most enlightened men, that the liberty of discussion is the chief safeguard of all other liberties."

The passing of the censorship was followed, in the reign of Queen Anne, by the rapid development in dignity and political and literary importance of the periodical press. Newspapers multiplied and such writers as Addison, Steele, Swift, and Defoe entered the field of journalism. But the press was not yet free. The government viewed with disfavor its increasing power and influence. It was proposed to revive the censorship,

but this was not done. But in 1712 a heavy tax was laid upon periodicals with the result that the circulation of newspapers was largely checked. The *Spectator* suspended publication the following year. The taxation of newspapers was kept up until 1855, and proved effective, not only as a source of revenue, but as a check upon the press.

But the most powerful instrument employed by the government during the eighteenth century for the suppression of freedom of the press was the law of libel. There were many prosecutions, especially during the reigns of Anne and George III. In 1704, for his *Shortest Way with Dissenters,* Defoe was fined, stood in the pillory, and imprisoned. His experience in the pillory inspired his *Hymn to the Pillory* in which he described his subject as "A hieroglyphic state machine, condemned to punish fancy in." The punishment for libel was not so barbarous as in the previous century, but the law of libel was more severe. By a departure from what seems to have been the law prior to the Revolution, it was held that evidence of the truth of the statements complained of was not admissible for the defendant, and that it was the province of the judge alone, and not the jury, to pass upon the criminality of the alleged libel, the function of the jury being to determine merely the fact of publication and the intended meaning of the words.

During the reign of George III the press became extremely bold and prosecutions for libel were numerous. It was in some of the most famous of these trials that the ability and eloquence of Thomas Erskine were enlisted in behalf of the rights of juries in libel cases; but the judges decided against him, among them Lord Mansfield, one of the purest and greatest of English judges. But Erskine's work was not in vain. In 1792 the principles for which he contended were embodied in the famous Libel Act, which was introduced by Fox and seconded by Erskine. The real freedom of the press in England may be said to date from this statute, though there was a brief temporary reaction shortly afterward due to the panic caused in England by the excesses of the French Revolution.[7] The power to control

[7] See BUCKLE, HISTORY OF CIVILIZATION, 349; GREEN, HISTORY OF ENGLISH PEOPLE, 317.

the press has been taken from the government and given to the jury. They are made the judges as to whether one shall be punished for what he has written or published. And with a jury taken from the body of the people there is little danger of tyranny. In the somewhat caustic words of Mr. Dicey, "Freedom of discussion is in England little else than the right to write or say anything which a jury consisting of twelve shopkeepers think it expedient should be said or written."

The English settlement of America took place at the time when the persecution of the press in England was at its height, and in the American colonies, from the beginning, the English and local governments restricted the liberty of the press. The first printing press was brought to Massachusetts in 1638, and set up the following year, but for a time it was little used. Even the laws were at first not published for general circulation, it being deemed by the magistrates best to keep the people in ignorance as to the precise boundary between what was lawful and what was not, so that they might be more likely to avoid doubtful actions. However, in 1649 they were compelled, by public opinion, to permit the publication of the laws, which they did under protest, as a hazardous experiment.[8] In 1662 the General Court of Massachusetts appointed two licensers, and prohibited the publication of anything not approved by them. In 1668 the licensers allowed the printing of Thomas à Kempis' *Imitation of Christ,* but the court stopped the printing of the book until it should be more thoroughly revised, "it being wrote by a popish minister, and containing some things less safe to be infused among the people." Some books were burned, among them the Indian Apostle Eliot's *Christian Commonwealth,* which the general court suppressed in 1660. A similar fate befell Robert Calef's attack on witchcraft, *More Wonders of the Invisible World,* written against Cotton Mather's *Wonders of the Invisible World.* Calef's arguments contributed powerfully to the decline of the belief in witchcraft, but the book irritated Cotton Mather, who called Calef a "coal from hell," and prosecuted him for slander; and his father, President Increase

[8] COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 601.

Mather, of Harvard College, ordered the wicked book to be burned in the college yard. The members of the Old North Church also came to the defense of their pastors, the Mathers, in a publication entitled *Remarks upon a Scandalous Book,* bearing the motto, "Truth will come off Conqueror."

With reference to Virginia, Sir William Berkeley wrote in 1671, "I thank God there are no free schools nor printing, and I hope we shall not have these hundred years; for learning has brought disobedience and heresy and sects into the world, and printing has divulged them, and libels against the best government. God keep us from both." In 1682 the first printer in Virginia was called before Lord Culpeper and his council for printing the session laws of 1680 without the governor's license, and required to give bond not to print anything thereafter until the king's pleasure should be known. The king, Charles II, instructed the next governor, in 1684, that no one should use a printing press in Virginia. From 1683 to 1729 no printing was allowed in Virginia, and from 1729 to about 1765 there was only one press in the colony and this was largely controlled by the governor. The first newspaper in Virginia, the "Virginia Gazette," was established in 1736.

The first newspaper published in America was Benjamin Harris's "Publick Occurrences Foreign and Domestick," of which the first and only number was issued in Boston September 25, 1690. It was immediately suppressed by the authorities. The "Boston News Letter" was established in 1704, and in a few years there were several papers in the colonies. James Franklin founded the "New England Courant" in 1721 and soon incurred the displeasure of the general council of Massachusetts on acount of his attacks on the government and individuals, and was censured and imprisoned for a month and forbidden to publish the "Courant," or any similar publication unless it was first supervised by the secretary of the province. The prohibition was evaded for several months by publishing the paper in the name of Franklin's younger brother, Benjamin, then sixteen years old. Benjamin Franklin mentions this occurrence in his Autobiography, and says, "During my brother's confinement, which I resented a good deal, notwithstanding our private dif-

ferences, I had the management of the paper, and I made bold to give our rulers some rubs in it." The paper was finally suppressed in 1727.

The first printer in Pennsylvania was William Bradford, who is noteworthy also as perhaps the first champion of the freedom of the press in the New World. In 1691 he was arrested for seditious libel and his press and other materials were confiscated. After a long imprisonment he was tried in 1692 before two Quaker judges. He conducted his own defense, and argued with power that the jury should be the judges not only of the fact of printing but also as to the character of the publication as libellous or otherwise, thus anticipating the memorable contention of Erskine by one hundred years. His plea was disallowed, the jury disagreed, and Bradford was returned to jail for another trial. Later, however, he was released by Governor Fletcher, who had been appointed also governor of Pennsylvania, and induced to remove to New York, where in 1693 he set up the first printing press in the province, and was appointed royal printer, an office which he held for more than fifty years.

William Bradford's nephew, Andrew Bradford, established in Philadelphia, in 1719, the "American Weekly Mercury," the first newspaper published in Pennsylvania. He, too, got into trouble with the authorities on account of an article criticising the assembly, and was compelled to make humble apology, being enjoined not to "publish anything relating to the affairs of this or any other of his majesty's colonies, without the permission of the governor or secretary."

But the emancipation of the press in the colonies was near at hand. In 1735, one John Peter Zengler was prosecuted in New York, at the instance of the governor, for seditious libel. At the time there was a strong party in opposition to the administration which supported Zengler, and a noted Philadelphia lawyer, Andrew Hamilton, was secured to defend him. Hamilton, who served without compensation, offered to prove the truth of the charge printed, but the chief justice refused to admit the evidence. Thereupon Hamilton boldly turned to the jury, "Then," he said, "we appeal to you for witnesses of the

facts. The jury have a right to determine both the law and the fact, and they ought to do so. The question before you is not the cause of a poor printer, nor of New York alone; it is the cause of liberty, * * * the liberty of opposing arbitrary power by speaking and writing truth." To the chagrin of the governor and his party, the jury brought in a verdict of not guilty, which was greeted with great applause. A banquet and other public honors were showered upon Hamilton, and the report of the trial was published in New York, Boston, and London, and attracted great attention.[9]

This was the last serious attempt, in the colonies, to curb the press, which later became a powerful influence in promoting the Revolution and the adoption of the constitution. And its freedom was to be left no longer in doubt. It was declared in the Virginia Bill of Rights of 1776 that "the freedom of the press is one of the great bulwarks of liberty, that can never be restrained but by despotic governments." Similar provisions were inserted in the first constitutions of other states. But in the Federal Constitutional Convention a proposal to insert in the Constitution a declaration that "the liberty of the press shall be inviolably preserved," was rejected by a vote of six states to three, on the ground that it was unnecessary because the power of Congress does not extend to the press.

The omission was supplied, however, by the First Amendment, which provides, among other things, that Congress shall make no law "abridging the freedom of speech or of the press." Several years after the adoption of this amendment, the Alien and Sedition Acts of 1798 were passed. These statutes were passed during the excitement of the impending war with France, and were aimed especially at the large number of foreigners who were then actively opposing the government, among whom were many of the most influential journalists attached to the Republican party. These were intemperate and violent in their attacks upon the Federalists, who were then in power, and were a source of embarrassment to the government in dealing with the French question. There were no prosecutions under the

[9] GREAT AMERICAN LAWYERS: Sketch of Andrew Hamilton.

Alien Act, but there were a number under the Sedition Act.[10] The statute was challenged as void under the First Amendment, but was sustained by the trial courts, the cases never reaching the Supreme Court. The statute is mild enough in its terms and subject to no reasonable objection, and would now almost certainly be sustained; but the temper of the times was such that the two statutes aroused intense feeling against the government and hastened the downfall of the Federalist party. They called forth the Virginia and Kentucky Resolutions, and would undoubtedly have been repealed but they soon expired by their own terms, the Alien Act in 1800, and the Sedition Act in 1801.

The last prosecution for political libel in this country was in 1804.[11] At that time a bitter war of words was waging between the Federalist and Democratic journals. The Democrats, angered by the prosecutions by the Federalists under the Sedition Act, resolved to institute retaliatory prosecutions, and, not venturing at first to attack the more prominent Federalists, selected as their first victim one Henry Croswell, a young editor of Hudson, N. Y., who was noted for the bitterness of his editorials. In his paper, aptly ealled the "Wasp," he had published a libel on Jefferson, the substance of which had previously appeared in the New York *Evening Post,* a journal controlled by powerful Federalists. The Democratic paper in Hudson, it may be remarked, bore the less vicious name of the "Bee." Croswell was prosecuted in a New York state court and convicted. He offered to prove the truth of the charge, but the trial court followed the earlier English rule and refused to allow the truth to be shown, and also charged the jury that they were to find only the facts and not the general question of the defendant's guilt. The case was taken to the Supreme Court of the state, where Alexander Hamilton appeared for the defendant. It was his last speech. Chancellor Kent, who was

[10] Reports of the trials of Matthew Lyon, Thomas Cooper, Anthony Haswell, and James Callender, under the Sedition Act, will be found in WHARTON'S STATE TRIALS, and also under the appropriate titles in FEDERAL CASES.

[11] People *v.* Croswell, 3 Johns. Cas. (N. Y.) 337 (1804).

one of the judges, afterwards wrote, "I have always considered General Hamilton's argument in that cause the greatest forensic effort that he ever made. * * * He never before, in my hearing, made any effort in which he commanded higher reverence for his principles, or equal admiration of his eloquence." A few weeks later he fell before the pistol of Burr The Supreme Court was equally divided in opinion, and the case went against the defendant, but shortly afterward the state legislature passed a statute embodying the principles contended for by Hamilton, that the truth may be offered in evidence and that the jury are the judges of both law and facts, and the defendant was given a new trial.

In the Federal Constitution, the constitution of all the states, and in the constitutions of many foreign governments are now found some sort of guarantees of the freedom of the press. In the American constitutions this guarantee is usually very positive, laws abridging the freedom of the press being prohibited; but, in the constitutions of some of the foreign states the guarantee is but a shadow. And as we observe the operation of press laws in most of the countries outside of the English-speaking world, we find that freedom of the press is rather a name than a reality. In some instances the language of the guarantee means little or nothing; the freedom is illusory. Of what avail, for example, is the colorless declaration of the Japanese constitution of 1889 that, "Japanese subjects shall, within the limits of law, enjoy the liberty of speech, writing, publication, public meetings and associations?" No check whatever is imposed upon the legislature in enacting press laws, and in 1894 and 1905 stringent laws were passed which, however, were soon repealed because of public feeling against them. In Spain the guarantee is against a censorship merely. Russia has long been notorious for its censored and persecuted press, and yet the constitution of 1906 provides that "Every one shall have the right, within the limits prescribed by law, to express his thoughts orally or in writing, and also to disseminate them through the press or by other means." In 1908 seventy-three newspapers and periodicals were suppressed in Russia.

Even when we come to examine the guarantee in the Consti-

tution of the United States we may well doubt whether it is of substantial value in securing the freedom of the press. There has been no authoritative definition of the term "freedom of the press" as employed in this guarantee, for no case involving the question has come before the Supreme Court. Some authorities, such as the early commentators, Kent, Story and Rawle, were of opinion that the guarantee simply prevents the establishment by Congress of a censorship. This view is probably too narrow. The mere right to publish without previous license would be of small value without some protection against arbitrary punishment by the government for what one publishes. At the same time, complete irresponsibility for the use made of the press is out of the question. The true freedom of the press lies somewhere between these limits. Any law of Congress, therefore, which, although restrictive of the right to publish, still leaves one free to make a proper use of the press, would not violate the constitution.

This brings us back to the law of libel. No law punishing one for libel would abridge the freedom of the press. There are no common law crimes against the United States, and hence there can be no prosecution by the federal government for seditious libel without an act of Congress so providing. And since the expiration of the Sedition Act in 1801 there has been no such statute, except in so far as the war statutes of 1917 may be so considered. But the validity of any legislation by Congress on the subject must depend upon whether or not it abridges the freedom of the press, and since the Constitution nowhere defines this term, we must fall back upon the common-law of the subject as developed in the law of libel. Probably no better definition can be found than that urged by Hamilton in his argument in Croswell's Case, and which was adopted by Chancellor Kent as a comprehensive and accurate definition, that is, "the liberty of the press consists in the right to publish, with impunity, truth, with good motives, and for justifiable ends, whether it respects government, magistracy, or individuals."

Under this definition honest criticism of the government or of individuals and institutions is lawful, especially when the

object of such criticism is the improvement of the government, the laws, or of the administration of public affairs. But the right of criticism must be exercised with due regard for public safety and private character. And, in the words of an English judge, [12] "Where vituperation begins, the liberty of the press ends. * * * The liberty of the press allows us to persuade men to use their constitutional influence over their representatives to obtain, in the regular Parliamentary manner, a redress of real or supposed grievances. But this must be done with temper and moderation, otherwise instead of setting the Government in motion for the people, the people may be set in motion against the government."

If, in all prosecutions for the abuse of the liberty of the press, the question of the defendant's guilt is left to the jury, it will be for them, at last, to define the boundaries of this liberty. And in their hands the matter may safely rest. While definitions may be difficult, it is not hard to distinguish between honest criticism and vituperation, between loyal protest and sedition. The jury is drawn from the people, and their opinion may be considered representative of public opinion in general. Thus, in each case, as it arises, the jury will define for that case the liberty of the press, and with the constant change of conditions and of public sentiment, we may expect corresponding changes of opinion as to what may or may not lawfully be published. And that public opinion in this matter should rule is in full accord with the spirit of our government. It seems that Hamilton was not far wrong when he wrote, "What is the liberty of the press? Who can give it any definition that would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government. And here, after all, * * * must we seek for the only solid basis of all our rights. Similarly, Treitschke, looking at the subject from the standpoint of the government, after examining the possible modes of

[12] Best, J., in Rex *v.* Burdett, 4 B. & Ald. 95, 132 (1820).

state control of the press, observes, "We must, unfortunately, come to the conclusion that in a free state a better appreciation of moral values on the part of the public is the only way in which an unworthy press can be made to reap the contempt which it deserves."

From the foregoing review, it will appear that in English-speaking countries, in times of peace, at least, the question of the freedom of the press as it was originally presented, has become almost entirely of merely historical interest. In former times the energies of the government were directed against publications deemed inimical to the government or the established religion. No attempt was made to protect the public morals by the suppression of obscene or immoral publications. At the time when serious but unorthodox works on government or religion were proscribed, the most indecent and degrading publications issued freely from the press. The object of the government was to protect itself, not the people. Now, in time of peace, almost the only restriction put upon the press is imposed for the protection of private reputations and the public morals. Damages are awarded for libels, and fraudulent and obscene publications are suppressed. In the latter connection the federal government exercises great power through its control of the postal service, a power which can as well be exercised for its own protection by the exclusion from the mails of seditious or treasonable publications.

The scope of this paper does not include a discussion of the control of the press by agencies other than the law. At present in this country it is by such other agencies mainly that the press is or may be controlled. Thus the control of the news distributing agencies or the influence of advertising patronage, may seriously abridge the liberty of the press. On the other hand, the evil to be apprehended from an unrestrained press is largely neutralized by the multiplicity of periodicals, affording abundant opportunity for the presentation of all sides of any question.

Upon the whole, history teaches that artificial restraints upon the liberty of the press are usually futile and injurious. Opinion cannot be wholly held in check, and one of the surest

ways to stimulate discontent is to suppress the discussion of grievances. On the other hand, as the press has become freer it has become purer; in a free country public opinion, led by a free press, may generally be depended upon to keep the press itself from abusing its power. Further, wherever the press has once been set free, we need not expect to find it again in chains. There may be temporary setbacks; the inrolling waves recede, but the tide rises. A people who have once tasted freedom will never be content with slavery, and in this country, while some legal restraint upon the press may at times be necessary, the real freedom of the press is secure.

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